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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 987 68

ARTHUR McCOY,

Petitioner,

vs.

STATE OF WEST VIRGINIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA AND BRIEF IN SUPPORT THEREOF.

ARTHUR McCOY,
Pro se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 987

ARTHUR McCOY,

Petitioner,

vs.

STATE OF WEST VIRGINIA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Arthur McCoy, would respectfully represent that he is aggrieved by a final judgment of the Supreme Court of Appeals of West Virginia, rendered against him on the 6th day of February, 1940.

Statement of the Case.

The defendant was indicted at the September, 1938 term of the Intermediate Court for alleged violation of Code Chapter 61, Article 10, Section 10, which forbids the operation of a "pool room" wherein lotteries are conducted, etc. The indictment is in two counts, the first count charging that the defendant "did unlawfully and knowingly set up and promote a pool room in violation of Section 10, Article 10, Chapter 61 of the Official Code of West Virginia," etc. The second count charges that the defendant "was unlaw-

fully connected with and interested in the management and operation of a pool room in violation of Section 10, Article 10, Chapter 61 of the Official Code of West Virginia."

The defendant demurred to the indictment and each count thereof for the reason that it did not apprise him of the offense charged, nor what issue he was called upon to meet. The demurrer was overruled. Defendant firmly believes that the indictment is fatally defective for indefiniteness.

Defendant called upon the State to furnish a bill of particulars, but the request was overruled.

Upon the trial of the case the State introduced in evidence the affidavit of A. J. Morgan for a search warrant, and the search warrant itself, based upon the affidavit. It appears that the affidavit is not based upon any statement of facts, but is based upon information and belief. The evidence of Morgan upon the trial shows that he had no actual knowledge of a violation of the law. The objection of the defendant, and his motion to quash the affidavit and warrant, were overruled.

Upon the trial of the case the Intermediate Court admitted in evidence over objection of the defendant, certain "horse race" tickets and other paraphernalia confiscated as a result of the raid conducted under said search warrant.

Points Relied Upon for Reversal.

1. The court erred in overruling the demurrer to and motion to quash the indictment.

2. The court erred in overruling the request for a bill of particulars.

3. The court erred in admitting, over objection of the defendant, the affidavit of A. J. Morgan.

4. The court erred in admitting, over objection of the defendant, the search warrant issued upon the affidavit of A. J. Morgan.

5. The court erred in admitting, over objection of the defendant, the evidence confiscated as a result of the raid conducted by virtue of the said search warrant.

For these and other errors apparent upon the face of the record, your petitioner prays that he may be granted a writ of certiorari to review the judgment complained of.

Respectfully submitted,

ARTHUR McCOY,
Pro Se.

J. V. BRENNAN,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 987

ARTHUR McCOY,

Petitioner,

vs.

STATE OF WEST VIRGINIA.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY.

BRIEF FOR PETITIONER.

Statement of the Case.

Arthur McCoy was indicted by the grand jury of Kanawha County in two counts, alleging the violation of Chapter 61, Article 10, Section 10, of the Code, which forbids the operation of a "pool room wherein lotteries are conducted, etc."

The first count merely charges that the defendant "had unlawfully and knowingly set up and promoted a pool room in violation of Section 10, Article 10, Page 61, of the Official Code of West Virginia," etc. The second count charges that the defendant "was unlawfully connected with and interested in, the management and operation of a pool room in violation of Section 10, Article 10, Chapter 61, of the Official Code of West Virginia."

The defendant demurred to and moved to quash the indictment on the ground that the same was indefinite and failed to apprise him of the charges against him. The demurrer and motion were overruled.

Upon the trial of this case there was introduced in evidence an affidavit of one A. J. Morgan that "he has just cause to believe and does believe, that money and other property to be raffled for and to be won therein * * * in that certain store room situated at 117 Summers Street, City of Charleston," etc., and prayed for the issuance of a search and seizure warrant. A search warrant based upon said affidavit was issued by Edwin S. Watson, a Justice of the Peace of Kanawha County, directed to the Department of Public Safety, and upon said warrant members of the Department of Public Safety made a raid upon the Colonial Pool Room, which is located at 117 Summers Street in Charleston, and a quantity of so-called evidence of horse race betting was confiscated; and the defendant McCoy was taken into custody.

At his trial the defendant demurred to and moved to quash the indictment, which motion and demurrer was overruled.

Over objection of the defendant, the court permitted to be introduced in evidence the so-called horse race tickets and a "form sheet" relating to horse racing.

Points and Authorities.

1. The trial court erred in overruling the demurrer to the indictment.

State v. *Welch,* 69 W. Va. 547;

2 Wharton's Crim. Proc. (1918), 1337;

State v. *Viquesney,* 103 W. Va. 392.

2. The court erred in overruling the motion to quash the affidavit for search warrant.

U. S. Const., Fourth Amendment;
W. Va. Const., Art. 3, Sec. 6;
U. S. v. *Dziadus* (W. Va.), 289 Fed. 837.

3. The court erred in overruling the motion to quash the search warrant issued pursuant to an affidavit based upon information and belief.

State v. *Lacy*, 118 W. Va. 343, 346;
Byars v. *U. S.*, 273 U. S. 28, 71 L. Ed. 520, 47 Sup. Ct. 248;
Simmons v. *U. S.*, 18 F. (2d) 581;
Wagner v. *U. S.*, 8 F. (2d) 581; Annotations: 13 A. L. R. 1316; 27 A. L. R. 709; 3 A. L. R. 1514; 39 A. L. R. 811; 74 A. L. R. 1419;
Osborne v. *Commonwealth*, 214 Ky. 84, 282 S. W. 762.

4. The court erred in admitting in evidence the property taken upon the raid conducted under the search warrant in this case.

State v. *Emsweller*, 78 W. Va. 214, and other cases above cited.

5. The raid and taking of property under the search warrant in this case was an unreasonable search and seizure.

Const. W. Va., Art. 3, Sec. 4;
Const. U. S., Fourth Amendment;
Ripper v. *U. S.*, 78 Fed. 24;
Schenks v. *U. S.*, 2 F. (2d) 185;
Wagner v. *U. S.*, *supra;*
Simmons v. *U. S.*, *supra.*

Argument.

Counsel for the defendant is quite serious in his insistence that the indictment and each count thereof is bad. Our

courts have consistently held that an indictment, to be valid must state every element constituting a crime. The indictment in this case states no element other than that he defendant had set up a pool room, in the one count, and was interested in a pool room in the other count. Nowhere in the indictment are any of the elements stated in the statute. *State* v. *Viquesney, supra,* which holds:

> "Every fact necessary to constitute the crime sought to be charged should be directly and affirmatively alleged in an indictment. No essential element of offense should be left to intendment, implication or recital." State *v.* Welch, 69 W. Va. 547.

The *Viquesney* case, page 393, quotes with approval the statement of the rule as laid down by the Supreme Court of the United States and there cites the authorities.

Any attempt to reconcile the indictment in this case with the accepted rules of pleading, it seems to us, would prove futile and, notwithstanding the reluctance of the courts to sustain a technical objection to a pleading, certainly the error in this indictment is so glaring that there is nothing else for the court to do.

See 2 Wharton's Criminal Procedure (1918), 1337, where the following appears:

> "An indictment or information charging the offense in any of its phases of setting up and maintaining and carrying on and conducting lottery in violation of the statute as in all other charges of criminal offenses must charge such offense with definiteness and certainty so that the court may be able to determine whether the crime charged has been committed, the accused may be apprised of a particular accusation he must meet and the jury know what is the question presented for their determination. Failing to meet these requirements, the indictment or information will be insufficient. Thus a general charge against the accused of having an in-

terest in lotteries or in a named lottery is too general."

Objections were timely made by counsel to the introduction of a complaint for a search warrant based upon information and belief, the warrant itself, and to evidence introduced in support of the warrant.

The statute under which the warrant was issued in this case is rather confusing (Code 62-1-18). In its inception it requires upon oath (not on information) that personal property has been stolen and that it is believed to be concealed in a particular place, the justice shall issue a warrant. But the statute goes further and says: "On like complaint on oath" and provides for the issuance of search warrants in cases similar to this. Does the phrase "on like complaint on oath that personal property has been stolen, etc." or does the phrase refer to "and that it is believed to be concealed"? It is the belief of counsel for the defense that the legislature intended that an affidavit for a search warrant should state such facts upon oath as would justify the issuance of warrants. The statute indicates that the affidavit must show on oath that a crime has been committed and not that the person making the affidavit believes that a crime has been committed.

Our legislature in the new liquor statute saw the viciousness of the liberal requirement for a search warrant in the so-called prohibition statute, and great weight should be given to this in considering the statute with respect to lotteries.

There are several West Virginia cases holding that an affidavit for a search warrant is sufficient, under the so-called "prohibition" statute, which provided that such affidavit could be made on information and belief (Code 1923, Sec. 9, Art. 32A). But that statute has been repealed. In any event, it had no application to cases other than liquor cases.

The later liquor law requires that the affidavit state facts. Code 1937, 62-1-18 (Michie's Sec. 6164). See *State* v. *Lacy,* 118 W. Va. 343, 346.

The Constitution of the United States and the Constitution of this State forbid unreasonable searches and seizures, and provide that no warrant shall issue except upon probable cause. How can the magistrate issuing the warrant know that there is probable cause unless some facts are stated in the affidavit or complaint? In this case there is no fact stated from which the Justice issuing the warrant could determine that there was probable cause for issuing the warrant.

In the case of *Wagner* v. *United States, supra,* the court held that evidence to justify a finding of probable cause must be such as would be admissible on a trial, and that a finding of probable cause must be based on facts and not suspicions, beliefs, surmises or mere conclusions. To the same effect is the case of *Simmons* v. *United States, supra,* in which it is held that affidavits supporting a search warrant must affirm facts by one having personal knowledge and not merely expressed beliefs or suspicions, and though it is not necessary that evidence submitted be sufficient to convict, it must be such as would be admissible before a jury, and that a mere belief of the affiant is not sufficient basis for the warrant.

All of the Federal cases are to the same effect. It necessarily follows that the complaint and warrant being invalid, evidence unlawfully secured under the warrant is not admissible in the trial of the case against the defendant. See *United States* v. *Dziadus, supra,* and *State* v. *Lacy, supra.*

It is quite evident that the Legislature of West Virginia saw the dangers growing out of the former provisions of the Code with respect to search warrants in liquor cases

when it specifically provided in the new section that the affidavit should state facts.

Code 1937, 62-1-18, is the section pertaining to search warrants in this case. While it does not specifically say that the complaint should state facts it does not authorize the issuance of a warrant upon information merely. If it could be said that a search warrant could be issued upon information there would be no end to the havoc that might be wrought. No home would be safe from prying eyes of vicious persons or indiscreet and overzealous officers. For instance, if a ladies' club should be entertaining at bridge at the home of one of the members, there is nothing to prevent the intrusion by officers armed with a search warrant sworn out by anyone, upon information and belief, that gambling is in progress. Unquestionably such would be an unreasonable search and seizure. And the same principle applies to a business establishment.

Respectfully submitted,

J. V. BRENNAN,
Attorney for Petitioner.

(7964)

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FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 355 November Term, 1940

JOHN PAINTER,
Petitioner,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

Petition for Writ of Certiorari, Brief in Support Thereof, and Notice of Presentation

J. THOMAS HOFFMAN,
SAMUEL J. GOLDSTEIN,
GEORGE V. MOORE,
HARRY H. MEIZLIK,
Attorneys for Petitioner.

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Pittsburgh, Penna.

PITTSBURGH PRINTING COMPANY
PITTSBURGH, PA.

IN THE

Supreme Court of the United States

No. **November Term, 1940**

JOHN PAINTER,
Petitioner,

vs.

BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Pennsylvania

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, John Painter, respectfully prays for a writ of certiorari herein to review a certain final decision of the Supreme Court of the Commonwealth of Pennsylvania, being the highest Court of said State, in the above entitled action, the opinion and decision of said Court having been rendered and filed May 20, 1940, by which decision the said Court held that a railroad employee was at the time he sustained serious personal injuries while engaged in moving and replacing a frame shanty in the terminal yard, which building contained flags, fuzees, lanterns, torpedoes and other signalling equipment used by the carrier in the operation of its trains, both interstate and intrastate, was not engaged in

interstate transportation. The structure was in continuous use during its removal and replacement, and trainmen obtained therefrom such signalling devices as they required upon the departure of trains, and the building was occupied at the time of the injury by an employee of the defendant engaged in filling, trimming and cleaning lanterns. The Court held the plaintiff was not engaged in interstate transportation within the purview of the Federal Employers' Liability Act of April 22, 1908, Chapter 149, 35 Stat. 65, and Amendments thereto, including the Amendment of August 11, 1939 Ch. 685, Sec. 1, 53 Stat. 1404 which places a legislative construction as to which employes are within the purview of the Act, and your Honorable Court has not determined its effect by judicial construction.

SECOND

Your petitioner, after assisting in moving the shanty across the tracks, the highway of interstate transportation, was placing a sill under the shanty, which was elevated on four railroad track jacks, one at each corner, when a jack slipped, causing the building to fall and crush his hand, necessitating partial amputation and resulting in permanent loss of use of the hand. He was the carpenter at the Pittsburgh Passenger Terminal, and his duties consisted, inter alia, of keeping in repair turntables and steam boxes in use in the yards.

THIRD

At the time the petitioner was injured, March 6, 1928, and at the time suit was brought, March 1, 1930, under the decisions of your Honorable Court the plaintiff was definitely engaged in interstate commerce, and therefore did not file a claim for Workmen's Compensation within the

year allowed by the Workmen's Compensation Act, for the reason that it would have been a vain gesture.

FOURTH

Had the petitioner failed to keep the shanty on an even keel, and it had fallen so as to block the entrance, and the trainmen would be unable to secure safety and signalling equipment promptly, it would have impeded the movement of interstate commerce, or have halted it altogether.

FIFTH

Your petitioner avers that the reason why the writ of certiorari should be issued is that this case involves a question which is of great public interest which should be determined by the Court of last resort: Where is the line of demarcation between employment in interstate commerce or transportation and intrastate, and what judicial construction should be placed upon the Amendment of August 11, 1939? Does its pronouncement as to which employes are engaged in interstate commerce within the purview of the act construe the original act from the date of its enactment and supersede the judicial constructions made in the interim or does it construe the original act only from the date of the Amendment?

Wherefore your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of Pennsylvania for the Western District, and to the Clerk thereof, commanding the said court and the said clerk to certify to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of Pennsylvania in the said cause, to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law, and that the said judgment of the said

Supreme Court of Pennsylvania shall be reversed by this Honorable Court, and that the petitioner have such further relief as may seem proper. And your petitioner will ever pray.

J. THOMAS HOFFMAN,
SAMUEL J. GOLDSTEIN,
GEORGE V. MOORE,
HARRY MEIZLIK,
Attorneys for Petitioner.

Affidavit

STATE OF PENNSYLVANIA }
COUNTY OF ALLEGHENY } *ss:*

Before me, the undersigned authority in and for the County and State aforesaid, personally appeared SAMUEL J. GOLDSTEIN, who being first duly sworn, deposes and says that he is one of the attorneys for the petitioner herein, that he has read the foregoing petition, and knows the contents thereof, that the matters therein are true of his own knowledge, and that in his best judgment and opinion the matter set forth in the said petition are fully supported in the transcript of the record filed herein.

.....

Sworn to and subscribed before me this.....
day of August, 1940.
(SEAL)

.....

Notary Public in and for Allegheny County,
Pennsylvania.

My commission expires.....

IN THE
SUPREME COURT OF PENNSYLVANIA,
WESTERN DISTRICT.

JOHN PAINTER, *Appellant*,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, *a Corporation*.
No. 5 March Term, 1940.

APPELLANT'S SUPPLEMENTAL BRIEF. FILED BELOW

The Act of Congress, approved August 11, 1939, Ch. 685 Sec. 1, 33 Stat. 1404 cited in our original Brief, is retroactive, the legislative intent being to clarify the meaning of the earlier statute and to surpress the mischief created by the narrowed construction of the Act placed upon it by the Courts. The further purpose of the amendment was to advance the remedy.

The report of the Senate Judiciary Committee of June 22, 1939, 76th Congress, First Session, Calendar No. 712, Report 661, stated it was the aim of the bill to amend the Act in three particulars: 1st, it broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce; 2nd, It abrogates the defense of assumption of risk in cases where injury or death is caused by the negligence of a carrier, and makes the doctine of comparative negligence applicable instead; 3rd, It prohibits the promulgation or enforcement of rules which penalize railroad employees

from giving information concerning accidents to the injured person or his representative.

The legislative intent that the statute have a retroactive operation may be readily inferred. The Judiciary Committee Report stated:

> "The question whether an employee, at the time of his injury is engaged in interstate or intrastate commerce, is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged at the time of the infliction of the injury 'in transportation or work so closely related to it to be practically a part of it'. *Shanks vs. D. L. & W. R. R.* 239 U. S., 556.******
>
> "As a result of the uncertainty which exists in border line cases, there have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case and no recovery could be had.
>
> The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee at the very instant of his injury or death, was actually engaged in the movement of interstate traffic."

We submit the first paragraph of the amendment merely placed a legislative construction on the Act. It clarified the Act. It could not broaden the Act because Congress had gone to the limit in its constitutional authority in the earlier act. The Act of April 22, 1908 was enacted after the Employers' Liability Act of June 11,

1906 was declared unconstitutional under the Employers' Liability cases, 207 U. S. 463, because it sought to impose liability upon the carrier for injury to employees without qualification or restriction as to the nature of the business at the time of the injury, which included subjects wholly outside the power of Congress under the Commerce clause of the Constitution. Congress having gone beyond its authority in enacting the 1906 Act sought in the 1908 Act to control the Employers' Liability to the full extent of its constitutional authority, so the first section of the amendment of August 11, 1939, could not broaden the jurisdiction of Congress nor further extend the operation of the law, and the only purpose the first section of the amendment could have would be to clarify the law and place the proper construction on the Act of April 22, 1908.

In 59 C. J., 1181, Section 718, it is said:

> "As a general rule, the act declaring the proper construction of a former statute is given a retroactive operation so as to determine the meaning of the earlier statute from its enactment. This rule, however, is universally recognized to be subject to the limitation that a declaratory act will not be given a retroactive operation to impair vested rights or to effect cases terminated before its passage."

In *Mosle vs. Bidwell,* 65 C. C. A. 533, it is held:

> "A declaratory act in the form of an amendment, placing a legislative construction upon the original act, will be construed retrospectively as taking effect at the same time as the original act."

In *West vs. Lysle,* 302 Pa., 147, the third paragraph of the syllabus reads:

> "3. An amendatory statute should be construed

in conjunction with the act to which it is an amendment taking into account the purpose sought to be effectuated by the amendment."

The purpose sought to be effectuated by the first paragraph of the amendment of August 11, 1939, was to suppress the mischief occasioned by "the uncertainty which exists in border line cases" and to advance the remedy against the evil:

> "There have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case, and no recovery could be had."

The Employers' Liability Act of June 11, 1906, was declared unconstitutional as it exceeded the authority granted Congress under the Commerce clause of the Constitution, so the Employers' Liability Act of April 22, 1908 sought to legislate to the full extent of the Constitutional authority of Congress. That is evidenced by the fact that in the second paragraph of the latter act, in jurisdictions where Congress had exclusive control of commerce, as in the District of Columbia, the Panama Canal Zone and the territories of the United States, the act is fully comprehensive and is not restricted to employees "while engaging in commerce between any of the several states", as is the first section of the act, which covers cases where Congress did not have complete and exclusive jurisdiction.

We submit the amendment was to meet the exact situation that the plaintiff in the case at bar has encountered, and to afford relief to those in that situation.

Respectfully submitted,

.....

NOTICE

TO:

S. C. Pugliese,

Margiotti, Evans and Pugliese,

Attorneys for Respondent,

Baltimore and Ohio Railroad

Company, a Corporation, and

TO:

The Baltimore and Ohio Railroad

Company, Respondent:

You and each of you will take notice that on the .....day of....., 1940, upon the opening of the Supreme Court of the United States, or as soon thereafter as it can be heard, the foregoing petition and brief, together with a certified copy of the entire transcript of the record in the said case will be presented and submitted to the said Supreme Court of the United States at its court room in the Supreme Court Building, Washington, D. C., in pursuance of its rule in such cases made and provided.

Dated this.....day of July, 1940.

.....

Attorney for Petitioner.

ACCEPTANCE OF SERVICE

Service of a copy of the within notice, together with a copy of the petition for writ of certiorari, brief and record accepted this.....day of July, 1940.

.....

Attorneys for Respondent.